SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 427

ALBERT BRADICK,

Petitioner,

—against—

IVAN ISRAEL, EDWARD A. KOLE and STANLEY KLIGFELD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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IVAN ISRAEL, EDWARD A. KOLE and STANLEY KLIGFELD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on May 1, 1967.

Opinions Below

The opinion of the Court of Appeals, affirming the judgment of the United States District Court for the Southern District of New York, Hon. William B. Herlands, sitting without a jury, in favor of defendants is printed as Appendix A hereto.

The memorandum opinion of the United States District Court for the Southern District of New York is printed as Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1967. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

1. Whether procuring the incarceration of a civil judgment debtor on a deliberately false affidavit of the judgment creditor constitutes malice.

2. Whether the jailing of a judgment debtor, for a second time (after having been released from a prior incarceration by the consent of the judgment creditor), by means of a false and fraudulent affidavit which concealed the fact of the prior incarceration was a violation of the debtor's constitutional rights under the 13th Amendment of the Constitution of the United States.

3. Whether the court below adopted a rule of law in conflict with general principles of justice in its affirmance of the Trial Court's decision.

The Constitutional and Statutory Principles Involved

The case of the petitioner here presented involves the Thirteenth Amendment to the Constitution of the United States, the Rules of Civil Procedure of the United States District Court, Rules 64 and 69(a), and the then effective Section 764 of the New York State Civil Practice Act. The provisions of each of these are fully set forth as Appendix C hereto.

Statement of the Case

In 1958 respondent Israel obtained a judgment against the petitioner. The judgment contained a decretal paragraph granting the right to a body execution for its enforcement. A body execution issued and the petitioner was incarcerated in 1959 and subsequently released upon the written consent of the judgment debtor. Three years later the judgment remaining unsatisfied, the respondents collaborated and applied for and obtained a second body execution against the petitioner on the same judgment and had him taken into custody. He thereupon made a *pro se* application for a writ of *habeas corpus* which issued, and upon a hearing the petitioner, subject to conditions imposed by the District Court judge, was released. The affidavit submitted by the respondents to accomplish the petitioner's second jailing, *inter alia,* affirmed under oath that:

> "... deponent has made no previous application to any court or judge for the relief prayed for herein."

The petitioner, first complying with the conditions imposed by the judge in the aforesaid *habeas corpus* proceeding, instituted the present action against the respondents for malicious prosecution. Findings of fact having been waived, the trial judge rendered a general verdict for the respondents herein. An appeal was taken to the Court of Appeals for the Second Circuit, and that court said that under the general verdict they would "assume" that the trial judge found no malice on the part of the defendants, and on that account, under the relevant law of the State of New York, the action could not be maintained. The circuit court stated further, that the record "supports such a con-

clusion". This conclusion is so at variance with the unchallenged documentary proof, that petitioner is aggrieved that a rule of law was adopted by that Court which is in conflict with the general principles of justice.

REASONS FOR GRANTING THE WRIT

1. The central question presented is when once the body of a judgment debtor is taken for debt, and then released with the consent of the judgment creditor, may the body be taken for a second time for the same debt without adequate cause.

2. Whether the procurement of an arrest unlawful *per se*, by means of a deliberately false affidavit constitutes malice *ipso facto*.

3. Whether the judgment creditor having accomplished the arrest of the judgment debtor under a decretal paragraph in the judgment is barred from subsequently arresting the debtor a second time under the guise of proceeding *de novo* under a statute, *dehors* the language of the judgment.

4. Whether the second incarceration, allegedly unlawful under the facts presented, constituted a violation of petitioner's rights under the 13th Amendment to the Constitution of the United States.

Taking the body in execution of a judgment for a second time without adequate cause was a violation of law.

The court below indulged in the assumption that the trial court's general verdict was a finding that there was no malice but made no reference to the uncontroverted fact that the affidavit procuring the second arrest showed no adequate cause for a second arrest, leaving the inescapable inference that the affidavit was deliberately false.

As was stated in *Goldberg* v. *Volkman*, 178 Misc. 375, 377 (New York):

> "The theory of the common law behind the rule that a judgment debtor held under a body execution might not be retaken under another body execution in the same action was that the imprisonment paid the debt, and a release of the prisoner with the consent of the judgment debtor was in effect an acknowledgment that the debt had been liquidated, and, if the creditor has taken security or a promise, he would be held to that *security* or promise for a satisfaction; the body of the debtor could not be retaken. The present statutory provisions have modified the old rule to the extent that a release of the judgment debtor with the consent of the judgment creditor, does not affect the creditor's right to enforce his judgment by *property* execution *but only cancels or exterminates his right to another body execution.*" (Emphasis supplied.)

While the cited case upheld a second taking, this was upon a finding of adequate cause, and the reasoning points up the inadequacy here.

Procurement of second arrest by a false affidavit was so deliberate as to constitute malice ipso facto.

The Court below assumed there was implicit in the general verdict of the trial court, that no malice was established. The charge that the affidavit used to procure the second incarceration was in fact false is uncontroverted. The trial record establishes that the first arrest was justified by the decretal paragraph in the judgment; that the second arrest was claimed by the respondents to be a *de novo* proceeding granted to them under the statute, and hence, the obviously paradoxical statement that no prior relief (*of this character*) had been asked for, was true. As the power to order body execution on a civil judgment derives from the statute of the state in which the District Court is located, the inclusion of the decretal paragraph in the original judgment of the direction to arrest, was merely a declaration of the statute. (See *Archawski* v. *Hanioti*, 239 Fed. 2d, 806, 810). The judgment creditor, therefore, had already had the benefit of the statute, and was not entitled to pursue it for a second time as an original proceeding.

The statute, the then prevailing Section 764 of the Civil Practice Act of the State of New York, requiring that the application be made *to the court* for the issuance of body execution has been interpreted to provide a judicial check *against* the issuance of such executions in unwarranted or unauthorized cases.

In re Tanenbaum, 165 Misc. 720;
Morgan v. *Cohen*, 168 Misc. 251;
White v. *Denny*, 258 App. Div. 144.

Adequate judicial review of the application thus was denied the *ex parte* judge, by the deliberately misleading and false statement that no prior relief had been had as well as the complete omission of mention of the prior proceedings to enforce collection of the judgment.

The two lawyer respondents who collaborated in the application for the second incarceration are charged with knowledge of the law of the state, and the provisions of the statute which required full disclosure to gain the approbation of the ex parte judge for issuance of the warrant. The conclusion is irresistible that the affidavit deliberately prepared to impede the Court and to effect the collection of a debt by coercion of imprisonment, was *ipso facto* evidence of malice.

In A.B.C. Needlecraft Co. v. *Dun & Bradstreet, Inc.*, 245 Fed. 2d 775, 777 the Circuit Court pointed out in a suit over publication of malicious material where the defense was privilege:

> "'Malice' required to destroy the privilege does not alone mean actual malice * * * (but) can also consist of 'such wanton and reckless disregard of the rights of another as is ill will's equivalent.'"

Violation of the petitioner's constitutional rights.

While the Thirteenth Amendment to the Constitution of the United States, under the early decisions of this Court, was aimed at curbing slavery and peonage, it has been subsequently interpreted to enlarge the rights of the individual against unlawful process. In *U.S. ex rel. Santo Caminati* v. *Murphy*, 222 Fed. 2d 698 (cert. den. 350 U.S. 896), Cir-

cuit Judge Frank at p. 700 stated: "To jail a man convicted without evidence of guilt is to impose 'involuntary servitude' which 'except as punishment for crime' the Thirteenth Amendment forbids." In the case of *U.S.* v. *Baird*, 241 Fed. 2d 170, Circuit Judge Medina refused to affirm a contempt order of the District Court to commit a debtor because he failed to pay a fine in a criminal conviction, after he had been released upon his promise to do so, stating that body execution as a means of collecting judgments was violation of the principles of justice.

In the report of the Judicial Council of the State of New York, 1946, at p. 341 it is stated:

> "Forty years ago, Charles Evans Hughes, Esq. (later Chief Justice of the Supreme Court of the United States) recommended the abolition of the provisional remedy of arrest in actions at law, and of the final remedy of body execution."

And this report quoting from the address of Chief Justice Hughes (p. 345),

> " 'Affidavits purporting to show proper grounds for arrest under the statute are easily prepared by the unscrupulous ' " . . ,states, "nothing has occurred in the intervening forty years to negative the correctness of the observations of Chief Justice Hughes which other commentators have reaffirmed."

As stated in *Peo. ex rel. Levine* v. *Shea*, 201 N.Y. 471, 474:

> "Imprisonment for debt dies hard. . . . It is the lawful use of torture and differs only in the degree of suffering caused from the thumb screw, the rack and the boot."

And in dissenting opinion of the New York case (*Rubin* v. *Freeman*) reported in 8 App. Div. 700, 702, it was said:

> "I agree with the majority of the court that the remedy of a body execution is a harsh one. . . . While the statute is still on the books, we must enforce it. *But at least we can insist upon exact and unquestioned compliance with the statutory provisions before extending the remedy to a judgment creditor.*" (Emphasis supplied)

It is the petitioner's position that the existence of the statute does not countenance its abuse, and for damages suffered by its abuse the petitioner's action for malicious prosecution was properly based.

Unlawful means to accomplish a desirable end violates established principles of justice.

It can not be gainsaid that an unsatisfied judgment creditor should not employ every means afforded to enforce a judgment. However, the coercion employed by taking the body of the debtor, must be lawfully obtained. This is in line with the many recent decisions of this Court on criminal cases. (Cf. *Escobedo,* 378 U.S. 478, *Miranda,* 384 U.S. 436, etc.). The affirmance in the instant case by the Court of Appeals of the trial court's determination, unchallenged, leaves us with a rule of law contrary to our established principles of justice.

CONCLUSION

For the foregoing reasons the writ of certiorari should be granted.

Dated: New York, N. Y.
July 20, 1967

Respectfully submitted,

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ANTHONY ATLAS
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On the Brief

APPENDIX A

Decision and Judgment Appealed From

(539) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TRANSCRIPT OF PROCEEDINGS OF OCTOBER 28, 1966

* * * * *

The Court has closely analyzed all of the exhibits in evidence and all of the testimony. The plaintiff and each of the three defendants testified as witnesses in the presence of the Court.

The Court closely observed the conduct and demeanor of the plaintiff and the three defendants while they testified.

The Court has considered the following legal authorities, among others: Barry v. Third Avenue R. Co., 51 Appellate Division, 385, 386 (First Department 1900); Schierloh v. Kelly, 253 Appellate Division, 373, 375 (Second Department 1938); Black v. Judelsohn, 251 Appellate Division, 559, 562-563 (First Department 1937); Burt v. Smith, 181 New York 1, 5 (1905); Smith v. Fontana, 48 Fed. Supp., 55, 58-59 (SDNY 1942); Prosser on Torts (Third Edition 1964), pages 853, 859-870; restatement of the law of torts, Section 653-673, Wigmore, volume 9, Sections 2539, 2554.

The Court's verdict is in favor of the (540) three defendants. The complaint is dismissed on the merits and with prejudice. Costs and disbursements are granted to the defendants.

The clerk is directed to enter forthwith the verdict and the judgment thereon.

Such is the judgment of the Court.

Formal Judgment Appealed From

(1055) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled action which is an action for malicious prosecution having duly come on to be heard before Hon. William B. Herlands, United States District Judge, without a jury, at Room 906, at the United States Courthouse, Foley Square, New York, N.Y., and the issues having been duly tried on October 25, 1966; October 26, 1966; October 27, 1966; and October 28, 1966, and the plaintiff having appeared by Nicholas Atlas, Esq., of counsel to Atlas, Berg & Mendalis, his attorney, and the defendant Stanley Kligfeld having duly appeared by Stanley Kligfeld, Esq., his attorney, and the proofs of both parties having been adduced and their respective counsel having been heard, and the court having after due deliberation on the 28th day of October, 1966, duly made and filed a decision in favor of the defendant Stanley Kligfeld and against the plaintiff Albert Bradick and directing (1056) the entry of judgment as hereinafter provided and the costs and disbursements of the defendant Stanley Kligfeld having been duly taxed in the sum of $148.80 and there being no just reason for delay of entry of this Judgment, it is

Now, on motion of Stanley Kligfeld, attorney for the defendant Stanley Kligfeld, it is

ADJUDGED, that the defendant Stanley Kligfeld, residing at 44 Wall Street, New York, N.Y., and an attorney by pro-

fession, recover of the plaintiff Albert Bradick, residing at West New York, New Jersey, and a securities industry cashier by profession, the sum of $148.80 costs and disbursements and that the defendant Stanley Kligfeld have execution therefor.

Dated: New York, N. Y.
November 2, 1966

WILLIAM B. HERLANDS
U.S.D.J.

Judgment Entered 11-4-66
JOHN J. OLEAR, JR.
Clerk

Second Formal Judgment Appealed From

(1063) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before the Honorable William B. Herlands, United States District Judge on October 25, 26, 27 and 28, 1966, and the Court at the conclusion of the evidence having found in favor of the defendants dismissing the complaint on the merits with prejudice, and a judgment (#68,233) in favor of the defendant Stanley Kligfeld only, having been entered herein prematurely on November 4, 1966, it is

ORDERED: That the judgment (#68,233) and the Bill of Costs on said judgment in favor of the defendant Stanley Kligfeld only, entered herein on November 4, 1966 be and are hereby vacated, and it is further

ORDERED, ADJUDGED and DECREED: That the defendants Ivan Israel, Edward A. Kole and Stanley Kligfeld have judgment against the plaintiff Albert Bradick dismissing the complaint herein on the merits with prejudice and with costs and disbursements to each defendant to be taxed.

Dated: New York, N. Y.
November 28, 1966

WILLIAM B. HERLANDS
U.S.D.J.

Second Formal Judgment Appealed From

Judgment Entered: 11-29-66
JOHN J. OLEAR, JR.
Clerk

December 12, 1966 Costs taxed in favor of the Defendant, Edward A. Kole as against Plaintiff in the sum of $26.90 and added.

JOHN J. OLEAR, JR.
Clerk

December 19, 1966 Costs taxed in favor of Def. Kligfeld as against the plaintiff in the sum of $148.80 and added.

JOHN J. OLEAR, JR.
Clerk.

February 10, 1967 Costs taxed in favor of Def. Israel as against Pltf. in the sum of $22.50 and added.

JOHN J. OLEAR, JR.
Clerk.

APPENDIX A-1

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,

Circuit Judges.

ALBERT BRADICK,

Plaintiff-Appellant,

—v.—

IVAN ISRAEL, EDWARD A. KOLE and STANLEY KLIGFELD,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the Appellees Edward A. Kole and Stanley Kligfeld.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX B

Judgment Entered May 1, 1967

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 414—September Term, 1966.

(Argued April 14, 1967 Decided May 1, 1967.)

Docket No. 31111

ALBERT BRADICK,

Appellant,

—against—

IVAN ISRAEL, EDWARD A. KOLE and STANLEY KLIGFELD,

Appellees.

Before:

MOORE, SMITH and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Hon. William B. Herlands, sitting without a jury, in favor of the defendants.

Affirmed.

NICHOLAS ATLAS, New York, N. Y. (Anthony H. Atlas, Atlas, Berg & Mendalis, New York, N. Y.), *for appellant.*

IVAN ISRAEL, appeared *pro se.*

Appendix B—Judgment Entered May 1, 1967

LOUIS J. MARTINE, New York, N. Y. (J. Kenneth Thompson, McMahon & Martine, New York, N. Y.), *for appellee Kole.*
STANLEY KLIGFELD, New York, N. Y., *pro se.*

PER CURIAM:

Appellant, Albert Bradick, instituted the present action against appellees, Ivan Israel, Edward Kole and Stanley Kligfeld, for malicious prosecution. The "prosecution" complained of was an application by Israel, a judgment creditor, in June of 1962, to the United States District Court for a body execution against Bradick, the judgment debtor, to enforce a judgment in the amount of $14,000.00 outstanding since 1958.

The *ex-parte* application was made pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and §764 of the (then effective) New York Civil Practice Act. The supporting affidavit signed by Israel and prepared by his attorney, Kligfeld, stated that:

> "... deponent has made no previous application to any Court or Judge for the relief prayed for herein."

However, in 1959, a prior body execution had been applied for and obtained by Israel and his attorney at that time, Kole. The 1959 body execution had issued pursuant to the original judgment which specifically included the right to body execution for its enforcement.

On the eve of trial of the present action, more than four years after the filing of the original complaint, and after Bradick had represented to the court that the case

was ready for trial, Bradick moved to amend his complaint by adding three new causes of action. The trial judge denied the motion on the ground that substantial delay would result as the amendment consisted of novel theories of law with new problems of proof.

After trial to the court, Judge Herlands rendered a general verdict for the defendants. A jury trial and findings of fact had been waived by the parties. Formal judgment was entered for the defendants on November 4, 1966.

Bradick appeals from the denial of his motion to amend the complaint and from the judgment on the merits.

Under the circumstances, Judge Herlands did not abuse his discretion in denying the motion to amend. *Wheeler* v. *West India S.S. Co.*, 205 F. 2d 354 (2d Cir.), *cert. denied* 346 U. S. 889 (1953); *Dale Hilton Inc.* v. *Triangle Pub Inc.*, 5 F. R. S. 2d 185 (S. D. N. Y. 1961); 3 Moore, Federal Practice §1508[4].

Under the relevant law, that of New York, a cause of action for malicious prosecution will not lie if the prosecution complained of was not "begun in malice" or if it ended in success for the prosecuting party. See, *Burt* v. *Smith*, 181 N. Y. 1, 5 (1905).

As findings of fact were waived and the verdict was general, we can only assume that Judge Herlands found no malice on the part of the defendants. Furthermore, the record supports such a conclusion.

The body execution ended in success for the appellees as Bradick was released from custody only after he had consented to submit to a second financial examination. The result of that examination was the payment by him of some $280.00 on the judgment.

Affirmed.

APPENDIX C

VIII. Provisional and Final Remedies and Special Proceedings

Rule 64. Seizure of Person or Property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable: (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Rule 69. Execution.

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in

which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

CIVIL PRACTICE ACT

§ 764 Issuance of Execution Against the Person Generally.

Subject to the exception specified in the next section, an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time when and the place where the execution against the judgment debtor's personal property has been returned wholly or partially unsatisfied.

SLAVERY ABOLISHED

AMEND. 13, § 1

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.